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No. 97-___

In The

**Supreme Court of the United States**

October Term, 1997

CHRISTOPHER A. TSIPOURAS,

*Petitioner,*

v.

STATE OF MINNESOTA

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Minnesota**

# PETITION FOR WRIT OF CERTIORARI

FRANK A. DELLE DONNE, ESQ.
*Counsel of Record*
342 Madison Avenue, Suite 1417
New York, NY 10173
(212) 599-3844

50PP

## QUESTIONS PRESENTED FOR REVIEW

### First Question

Whether a trial court may reasonably and legitimately rely on *Batson v. Kentucky* as not prohibiting racial discrimination in jury selection when the defendant and stricken juror do not share the same race.

### Second Question

Whether a juror who after being instructed still wishes to hear defendant testify compels a trial court to allow further *voir dire* of that concept to determine whether that juror is presuming innocence.

### Third Question

Whether failure to exercise any peremptory challenges against a group of questionably capable jurors is sufficient to establish an ineffective assistance of counsel claim.

### Fourth Question

Whether the guarantee to an impartial jury is violated when a juror admits during *voir dire* that she was not sure how her preformed opinions were going to affect her judgment.

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher A. Tsipouras respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Minnesota decided July 29, 1997.

## OPINIONS BELOW

The Order of the Minnesota Supreme Court denying further review is not reported, but is reprinted in the Appendix at page 20. (A-20).

The judgement and published opinion of the Court of Appeals of the State of Minnesota is reported at 567 N.W.2d 271 (Minn.App. 1997) and is also reprinted in the Appendix at page 12. (A-12).

The judgement of the Hennepin County District Court is not reported, but is reprinted in the Appendix at page 1. (A-1).

## JURISDICTION

The judgment and published opinion of the Court of Appeals of the State of Minnesota is dated July 29, 1997. The Supreme Court of the State of Minnesota denied further review on September 18, 1997. This petition is filed within 90 after that last date and is timely under Rule 13 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## STATUTES AND RULES INVOLVED

This case involves Minn.Stat. § 590.01 which is reprinted in the Appendix at page 21. (A-21).

## STATEMENT OF THE CASE

On August 10, 1989, petitioner, Christopher A. Tsipouras, was charged with first degree criminal sexual assault (Minn. Stat. §§ 609.342 Sub.1(e)(i) and 609.344 Sub.1(c) ). On December 13, 1989, petitioner was convicted in the Minnesota District Court for Hennepin County before the Honorable Philip D. Bush. Petitioner was sentenced to 120 months in prison. Petitioner appealed the conviction to the Minnesota Court of Appeals where the conviction was affirmed on January 15, 1991. The Minnesota Supreme Court denied review on February 20, 1991.

On March 5, 1996, petitioner filed a Petition for Post Conviction Relief under Minn.Stat. § 590.01 which the Honorable Philip D. Bush denied on October 31, 1996 without a hearing. (A-1 to A-11). On July 29, 1997, the Minnesota Court of Appeals affirmed the denial of relief in a reported opinion. (A-12). Tsipouras v. Minnesota, 567 N.W.2d 271 (Minn.App. 1997). The Minnesota Supreme Court denied further review on September 18, 1997.

Petitioner now files this Petition for a Writ of Certiorari in the Supreme Court of the United States seeking review of the final judgment denying post conviction relief because the published opinion conflicts with this Court's established federal constitutional rulings.

The relevant facts are as follows. On August 9, 1989, petitioner worked for the music artist LL Cool J as a bodyguard. Petitioner was between semesters on college recess. That evening the band was performing at the Met Center in Bloomington Minnesota. During the concert, petitioner met two girls and invited them both back to the hotel where the band and its employees were staying. Petitioner and the two girls took a limousine ride to the hotel. In the lobby of the hotel, petitioner indicated that he was going to go

to his room to take a shower. He went to his room and the girls followed him moments later.

After a relatively substantial time had passed, petitioner had sex with a Ms. Holly Shadden in the bathroom of the hotel room. There was no struggling or no indications that Ms. Shadden did not want to have sex. She testified that she told petitioner to use a condom which petitioner stopped kissing her, walked out of the bathroom to get a condom, was gone several minutes, came back in the bathroom, put it on, and had sex with Ms. Shadden. Ms. Shadden never left the bathroom, did not use the phone that was in the bathroom, and did not struggle in any manner. She also indicated that even after the alleged rape she still wanted pictures of LL Cool J and had friendly discussions with the other parties in the room including her friend Melissa. Apparently after petitioner had sex with Ms. Shadden and had left the hotel room, codefendants Gary Saunders and David Parker had sexual contact with Ms. Shadden and it was not until these subsequent sexual incidents that Ms. Shadden, by her own testimony, ever struggled or expressed that she did not want to have sex.

At approximately the same time, Ms. Shadden's friend, Melissa, had consensual sex with Mr. Andre Greaves who was also present in the hotel room. Afterwards, Ms. Shadden and Melissa left the hotel. Ms. Shadden indicated to the police that she had been raped. She identified petitioner, Mr. Parker and Mr. Saunders as the "rapists". All three were charged with first degree rape. Petitioner was tried in December of 1989 with public defender counsel and wrongly convicted of the charge. The two codefendants were tried together in the end of January 1990. Each hired private attorneys and were both acquitted.

After petitioner's conviction, he retained a private firm for his appeal and post conviction matters. The record of the trial

indicated the following exchange during *voir dire* with Juror Longson:

Mr.Grochal: In your mind my client is innocent right now.
Ms. Longson: Yes.
Mr. Grochal: Do you have a problem in holding the state to its burden of proving convincingly that my client is guilty?
Ms. Longson: No
Mr. Grochal: Do you think it's the way it should be?
Ms. Longson: I don't know of any alternative. I mean it's fine.
Mr. Grochal: Well, the alternative would be for my client to try and prove to you that he is innocent ?
Ms. Longson: It's fine the way it is.
Mr. Grochal: Would you expect my client to testify?
Ms. Longson: **It would be nice to hear what the young man had to say.**
Mr. Grochal: What if he didn't; makes it tough?
Ms. Longson: It makes it tougher, yes. I would like to hear both views.
The Court: Ma'am, let me interject because we are getting into an area of law. I didn't give an instruction on the defendant is required to testify. They have an absolute right to remain silent and do not have to testify if they do not wish to. If he chooses not to testify, you will receive a jury instruction that says that he doesn't have to testify and that you would not draw any negative or bad inference towards him as a result of that . Would you be able to follow this instruction if that fact scenario happens? He may testify and he may not. That's his decision.
Ms. Longson: That's fine, yes.
The Court: I wanted to clarify it since it was not an area of law that I got into when I gave the preliminary instruction but it's come up.
Mr.Grochal: **Would you be able to follow the**

instruction ?
Ms. Longson: No problem. He has the right to remain silent.
Mr. Grochal: You can make your decision based on evidence you hear and not as to what someone might have said?
Ms. Longson: Yes.
Mr. Grochal: There's been some concern raised about police officer's testimony and I don't anticipate that the case is going to turn on what the police officers have to say. This case like probably 95 percent of all criminal cases didn't occur in the presence of the police officers. They're not there when anything happened. They respond after they get a call.
Ms. Longson: Uh-huh.
Mr. Grochal: Is that going to bother you one way or the other; do you think they should have been there or are you going to think anything they say is gospel or are you not going to believe anything they say because of an experience you might have had?
Ms. Longson: Anything the police officers?
Mr. Grochal: The police officers.
Ms. Longson: I would like to hear what – the girl and the young man have to say. I don't know what the policemen will say to really make it concrete. I mean, they were not there. You know. I probably am not making any sense.
Mr. Grochal: No, you are making sense. Keep coming back to this thing. Keep ringing bells in my head. I asked one of the jurors about this saying there are "two sides to every story" I'm sure you've heard the expression?
Ms. Longson: Yes.
Mr. Grochal: And essentially what it means is when you hear the state's version as they are required by law to present their version, the defense is not required – the Judge will tell you that and already has –to present any evidence at all. But keep saying, "I would like to

hear what the young man and the girl"--
Mr. Johnson: ( Prosecutor) I object to any further inquiry on this line. I believe the question has been asked and answered and the perspective juror has said she will follow the instruction as given by the Court.
The Court: The objection is sustained. (Tr. I, 240-244).

Ms. Longson demonstrated that she could not understand the "right to remain silent" instruction. The trial court did not strike her for cause or allow the defense to further probe Ms. Longson's bias in "wanting to hear what the defendant had to say" and how that affected the presumption of innocence.

Subsequently, during jury selection, defense counsel voir dired Mr. Taylor. Defense counsel's questioning revealed that Mr. Taylor was a fair and impartial man to both the defense and the prosecution. After defense counsel elected to seat Mr. Taylor, the prosecutor exercised a peremptory challenge against Mr. Taylor. Defense counsel made an objection citing Batson v. Kentucky. The following exchange took place:

Mr. Grochal: . . . I think I have no alternative but to make a motion at this time based on Batson v.Kentucky and the fact that I think the prosecution striking the one black juror denies my client the right to have a cross section of the community sit in this as jurors in this case. I guess I ask perhaps the Court to make an inquiry as to the reasons that the juror was stricken.
The Court: Before I get into an inquiry, do you have any response that you wish to make ? I'm not saying I will not inquire. Do you wish to respond to his request for an inquiry ?
Mr. Johnson: As Mr. Grochal noted, Your Honor, during jury selection process this morning in inquiring with the one juror, his client is not black. His client is white and there is no doubt in any of the jurors mind that he is white. And I don't think racial prejudice or racial

discrimination in picking a jury is any issue in this case given the fact that we don't have a black defendant.

The Court: The motion for mistrial is denied.
[T]hat, as you stated, Mr. Grochal, in your voir dire, that race is not an issue in this case in terms of cross race. It doesn't mean that a white defendant is entitled to an all white jury or a black defendant is entitled to an all black jury but there's been no threshold showing in this case and I will not do the inquiry. I don't see it as an issue here. You certainly protected your record. That's fine. (Tr. I 277-279).

During *voir dire*, jurors gave the following testimony:

1. Ms. Herzog-Lowery testified that she was robbed at gunpoint one week prior to being called (Tr. I-51);
2. Ms. Jaggers testified that her mother's house had been broken into and that Ms. Jaggers herself had money stolen. (Tr. 60, lines 15-18);
3. Ms. Longson also stated that her close niece that she viewed as her daughter was abducted, naively went voluntarily with a man not knowing of the possible consequences, that "something bad had happened", and that she was the victim herself of a theft (Tr. I 245-249). Also, Ms. Longson brought the abduction of her niece up on her own volition and interjected the court proceedings (Tr. I 128, lines 23-25, Tr. I 129 lines 1-18);
4. Mr. Welch indicated that his daughter had been molested (Tr. I lines 13-15);
5. Ms. Salek testified that she was shocked over the bizarre nature of the story when she read it in the paper. (Tr. I 76, lines 24-25). When she was asked if she could put this aside she said she would "attempt to do so" three or four times. (Tr. I 77 lines 6-10). Ms. Salek also indicated that she has very strong feelings regarding these fact patterns, that the perpetrator bears the main

responsibility, and that she didn't know how her strong feelings would affect her judgment. (Tr. I-284 lines 10-22). Ms. Salek also testified that she dwells on things that are negative, that she was concerned she would become obsessed with this trial and that she "can't change gears". (Tr. I 281 6-10).

6. Ms. Van who served as a juror alternate testified that her sister was raped. (Tr. I 96, lines 4-7) Neither, the defense counsel, the prosecutor nor the court questioned on this extremely relevant issue.

7. Wilcox testified that she had worked with a female student who had been the victim of a sexual assault as well as having worked with prosecutor's brother. (Tr. I 308)

The trial ensued. Petitioner was wrongly convicted of the charge. Petitioner retained counsel for the direct appeal. The Minnesota Court of Appeals affirmed the conviction in an unpublished opinion on January 15, 1991. State v. Tsipouras, No.C7-90-708, unpub.op., 1991 WL 1942 (Minn.App. Jan. 15, 1991), review denied (Minn. Feb. 20, 1991). The Minnesota Supreme Court denied further review on February 20, 1991. A petition for certiorari was not filed in this Court.

Five years later, petitioner, retained his present counsel. On March 5, 1996, petitioner filed for postconviction relief in the same court where the criminal trial was held. Petitioner raised the following issues:

1. Petitioner is entitled to relief because the trial court erred in foreclosing a Batson challenge solely because petitioner is white and the stricken juror is black.

2. Petitioner is entitled to relief because the trial court did not allow petitioner to *voir dire* Juror Longson's bias in wanting to hear what the defendant had to say.

3. Petitioner is entitled to relief because trial and appellate

counsel was ineffective under the *Strickland* standard.

4. Petitioner is entitled to relief because Juror Salek was not impartial due to her strong feelings, obsessions, and preformed opinion from pretrial publicity.

On October 31, 1996, the original criminal trial Judge, the Honorable Philip D. Bush, denied postconviction relief without a hearing. On the Batson claim, Judge Bush reiterated that at the time of trial a prima facie showing of state discrimination against the stricken juror could not be made because petitioner was Caucasian and the juror was African American. (A-5; *Supra, 6-7*). Judge Bush also ruled: (1) that further voir dire of Juror Longson was not required at that point even though she again brought up her desire to hear him testify after being instructed; (2) that petitioner could not show prejudice regarding Juror Longson's bias in wanting to hear what the defendant had to say because "it was defense strategy prior to trial to prove that the victim consented to sex" (A-7); (3) that petitioner elected to testify thereby mooting the issue of prejudice without any consideration of how this affected the presumption of innocence. (A-7). Judge Bush also ruled that: (4) trial counsel was not ineffective for not attempting to remove jurors who had a substantial connection to assault fact patterns; and (5) that none of the jurors were biased under the Sixth Amendment guarantee to an impartial jury. (A-11). Judge Bush denied postconviction relief on October 31, 1996. (A-1).

Petitioner appealed the denial of postconviction relief to the Minnesota Court of Appeals which issued a reported opinion affirming the judgment denying postconviction relief. Tsipouras v. Minnesota, 567 N.W.2d 271 (Minn.App. 1997); (A-12). The Minnesota Supreme Court denied further review on September 18, 1997. (A-20). Petitioner now files this Petition for a Writ of Certiorari in the Supreme Court of the United States respectfully seeking review of the final judgment

denying postconviction relief in that the reported opinion is in conflict with this Court's established Federal Constitutional standards.

## REASONS FOR GRANTING THE WRIT

Petitioner contends that the final judgment and published opinion denying post conviction relief conflicts with this Court's established Federal Constitutional standards. (A-12).

### I. PETITIONER IS ENTITLED TO RELIEF ON THE *BATSON* CLAIM

A. The Minnesota Courts erred in holding that, at the time of petitioner's trial, the trial court and the state had virtually no enforceable obligation to prevent racial discrimination against black jurors in situations where there was a white defendant. This was done with unreasonable and illegitimate reliance that, at the time of trial, Batson, Equal Protection and existing standing rules did not forbid purposeful discrimination against jurors of a race different than the defendant. (A-5, A-15); Tsipouras v. Minnesota, 567 N.W.2d at 274-275. (Minn.App. 1997). Petitioner contends this is plain error.

"[B]y denying a person participation in jury service on account of race, the State unconstitutionally discriminated against the excluded juror." Batson v. Kentucky, 476 U.S. 79, 87, 106 S.Ct. 1712, 1718, (1986), citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880). A defendant's standing to assert the stricken juror's denial of Equal Protection serves to protect the rights of the stricken juror, the integrity of the judiciary, and the fundamental fairness of the trial. Batson, 476 U.S. at 84-87, 106 S.Ct. at 1716-1718; Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct.1029 (1972). *See also,* Holland v. Illinois, 110 S.Ct. 803, 811 (1990), 493 U.S. 474, 488; Powers v. Ohio, 111 S.Ct.1364 (1991); 499 U.S. 400. "The

[Batson] standard is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race." Batson, 476 U.S. at 99 FN 22, 106 S.Ct. at 1724 FN 22. A limitation on a defendant's right to object based on his race "conforms neither with our **accepted** rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law." Powers v. Ohio, 499 U.S. at 406, 111 S.Ct. at 1368.

In the case at bar, the Minnesota Courts erred in holding that at the time of petitioner's trial, Batson, Equal Protection and accepted standing rules did not forbid purposeful racial discrimination in jury selection when the juror and the defendant do not share the same race. Tsipouras v. Minnesota, 567 N.W.2d at 274-275; (A-5, A-15). Holding that Powers extended the Batson prohibition against purposeful racial discrimination to cases where the defendant's race differs from that of the excluded juror misplaces the entire Equal Protection analysis these claims are based on. Petitioner contends that Equal Protection has always forbidden purposeful discrimination against a particular race of jurors without any consideration to the race of the defendant. Batson v. Kentucky, 476 U.S. at 84, 106 S.Ct. at 1716 citing, Swain v. Alabama, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-827 (1965).

The language in Batson for racial identity between the stricken juror and the defendant exists to determine whose Equal Protection rights have been violated. In Batson it was the defendant's because the black defendant would be intentionally singled out for different treatment based solely on his race when the state prosecution is predisposed to strike black jurors. This treats that black defendant differently than defendants of other races who would not be subject to such intentional discrimination based on their race when the state prosecution is predisposed to remove black jurors or not

include them in the venire. (*i.e.*, defendant's of other races would still have a chance to be tried by members of their own race when the state prosecution is predisposed to remove black jurors or not include them in the venire whereas black defendants would never have a chance to have a black juror sit when the state is predisposed to remove black jurors with peremptories. *See*, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).

In Powers the racial identity language of Batson was not used because Powers was raising the Equal Protection rights of the black stricken juror which are violated if the state prosecution is predisposed to strike black jurors because the stricken black jurors would be intentionally treated differently than jurors of other races because they would not get a chance to sit on the jury where jurors of other races would. Either way, the trial is fundamentally unfair.

The Minnesota Courts in holding that the Powers Court extended the Batson protection against purposeful discrimination to cases where the defendant's race differs from the excluded juror would require an initial determination that prior to Powers the prosecution could have discriminated against potential jurors of a particular race different than the defendant's race by systematically removing those jurors then cloak the intentional discrimination against those stricken jurors by arguing that such conduct is permissible as reasonable and legitimate reliance on Batson. Such reasoning ignores federal statutory law and this Court's unyielding position over the past hundred years to eradicate intentional discrimination in jury selection. Batson's same race language is not used to determine whether there is an inference of racial prejudice. Rather, Batson's same race language is used to determine whose Equal Protection Rights have been violated-the juror's or the defendant's. Either way, the trial is fundamentally unfair if the trial court cannot and did not prevent intentional discrimination against a race of jurors.

Because the prosecutor, the trial court, and the Minnesota Court of Appeals did not reasonably and legitimately follow both the established precedent to prevent racial discrimination in jury selection and well accepted standing rules, petitioner contends that the Batson claim is properly before the Supreme Court of the United States which entitles petitioner to relief on federal constitutional grounds. Petitioner respectfully requests that Certiorari be granted.

B. The record supports an alternative basis for relief on petitioner's Batson claim because the prosecutor justified his peremptory strike by denying that he had a discriminatory motive for the strike. In *Garret v. Morris, 815 F.2d 509 (8th Cir.1987)(cert.denied, 484 U.S. 818 (1987)*, the court held that where a prosecutor justifies the strike, the presumption of correctness falls away and the trial court must require a race neutral explanation for the strike. Garrett 815 F.2d at 511. *See also*, Hernandez v. New York, 111 S.Ct. 1859, 1864 (1991), 500 U.S. 352, 356. In *Alexander v. Louisiana, 92 S.Ct. 1221, 1226 (1971), 405 U.S. 625, 632*, the Court held, "[N]or may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive."

In the case at bar, the prosecutor justified his peremptory strike which compelled the trial court to demand a race neutral explanation which it failed to do. (*Supra, 6-7*). The prosecutor justified the strike by stating that racial prejudice against the stricken juror can automatically be dismissed because the excluded juror and the defendant do not share the same race. *(Supra, 6-7)*. Accordingly, the court had a duty to ensure that the strike was not a pretext for discrimination. Merely denying discriminatory intent as the prosecutor did is insufficient as a matter of law. The burden had switched to the prosecution to provide a race neutral explanation which the trial court erred in not demanding. The trial court erred in not demanding a race neutral explanation and finding that the prosecution had not rebutted the presumption of discrimination. Petitioner

contends that he is entitled to relief and respectfully requests that certiorari be granted.

C. Petitioner contends that a third basis for relief on the Batson claim is that petitioner's conviction was not final before Powers v. Ohio was announced. Powers v. Ohio, 111 S.Ct.1364 (1991), 499 U.S. 400. A conviction becomes final where the time to petition for certiorari to this Court has elapsed. Caspari v. Bohlen, 114 S.Ct. 948, 953, (1994), 510 U.S. 383, 390; Teague v. Lane, 489 U.S. 288, 295, 109 S.Ct. 1061, 1067 (1989). Although petitioner contends that Powers is probably not a new rule as the Minnesota courts have characterized it as, to the extent this Court would find Powers to be a new rule, petitioner is still entitled to relief because the time to petition for certiorari to this Court expired on May 21, 1991 which demonstrates that Powers was decided while petitioner's conviction was technically still on direct review even though no petition for certiorari was filed in this Court. Caspari v. Bohlen, 114 S.Ct. at 953, 510 U.S. at 390; *See Rule 13.* Petitioner contends that if this Court finds Powers to be a new rule for Teague purposes, then petitioner is entitled to its application in *habeas* which would compel a finding of relief on the Batson claim.

Petitioner respectfully requests that certiorari be granted regarding the *Batson* claim on all three theories advanced.

## II. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO *VOIR DIRE* JUROR LONGSON REGARDING HER PREJUDICE TOWARDS PETITIONER'S PRESUMPTION OF INNOCENCE.

Petitioner was denied his constitutional right to *voir dire* juror Longson regarding her prejudice towards his presumption of innocence. Tsipouras v. Minnesota, 567 N.W.2d. at 275; *Supra 4-6*; (A-17). The criminal trial court

committed reversible error in not allowing defense counsel to question juror Longson on her bias of wanting to hear what the defendant had to say. "[T]he right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and suffer no penalty" is guaranteed by the Fifth Amendment and is made applicable to state criminal proceedings through the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493-1494 (1964). In all criminal prosecutions, the accused is entitled to a trial by an impartial jury. *U.S. Const. Amend. VI;* Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447 (1968). The defendant's right to an impartial, unbiased jury is protected by *voir dire* hearings where the jurors are reasonably questioned. Smith v. Phillips, 455 U.S. 209, 216-217, 102 S.Ct. 940, 946 (1982); *See also*, Dennis v. United States, 339 U.S. 162, 168 (1950), 70 S.Ct. 519, 523. In all criminal prosecutions the defendant is entitled to the presumption of innocence which is a conclusion drawn by the law in favor of the accused whereby innocence is automatically established until sufficient proof is introduced by the state to destroy it. Coffin v. United States, 15 S.Ct. 394, 404-405, 156 U.S. 432, 458-459 (1895), *See also*, Johnson v Armontrout, 961 F.2d 748, 755 (8th Cir. 1992) . Technically, the presumption of innocence is the first piece of evidence which is conclusively and automatically proved until the state introduces sufficient evidence to destroy the presumption. Coffin v. United States, 15 S.Ct. at 404-405, 156 U.S. at 458-459. "Without question the Fifth Amendment Privilege and the presumption of innocence are closely aligned." Carter v. Kentucky, 101 S.Ct. 1112, 1120-1121, 450 U.S. 288, 303-304 (1981). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences when they happen." Smith v. Phillips, 455 U.S. at 217, 102 S.Ct. at 946.

A juror who has a desire to hear what the defendant has to say during *voir dire* is not a capable juror as required by Due

Process because such a desire to hear the defendant testify demonstrates the juror's inability to accept the first automatically conclusive piece of evidence- the presumption of innocence. Such a desire to hear the defendant testify also demonstrates the juror's inability to understand that the defendant does not have to do anything as the burden of proof is on the state. In order to preserve the defendant's opportunity to demonstrate that a juror is capable, impartial, unbiased, and nonprejudicial towards defendant's rights, criminal trial courts must allow reasonable questioning on the juror's ability to understand the presumption of innocence and the defendant's right to remain silent.

This Court has reversed convictions when the right to query on *voir dire* has been unreasonably infringed. Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470 (1931); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848 (1973); See also, United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974).

In the case at bar, the trial court erred in not allow defense counsel to probe Longson's bias in "wanting to hear what the defendant had to say". After the court properly gave the "right to remain silent instruction", Juror Longson on her own volition again said, "I would like to hear what the girl, the man and the young man have to say." Tsipouras v. Minnesota, 567 N.W.2d 271, 275 (Minn.App. 1997). After Longson brought up her bias again, defense counsel began questioning her on the defendant's right to remain silent, presumption of innocence and that the state has the burden of proof. *Id.* at 275. *(Supra, 4-6).* The prosecutor objected to the defense counsel's question that it was asked and answered. The court improperly sustained the objection. Defense Counsel then immediately stated, "Judge, I think there is a Fifth Amendment issue here and I have a right to–". The court interjected and did not reconsider its ruling. *(Supra, 4-6).*

Petitioner had a Constitutional right to remain silent and a right to the presumption of innocence at the start of the trial. Juror Longson after being instructed that petitioner had an absolute right to remain silent, again stated that she wanted to hear the defendant testify. Tsipouras v. Minnesota, 567 N.W.2d at 275. Although petitioner contends that Ms. Longson did not comprehend the court's instruction because she again asserted her desire to hear defendant testify, at the very least, Ms. Longson demonstrated a reasonable probability that she did not comprehend the defendant's right to remain silent. With a reasonable probability that she wanted to hear the defendant testify during *voir dire* at the start of the trial, sufficient evidence existed that required the trial court to allow further *voir dire* regarding Juror Longson's capability to comprehend petitioner's presumption of innocence. Remember, the presumption of innocence is designed to be conclusive until the state submits sufficient proof to destroy it. Coffin v. United States, 15 S.Ct. at 404-405, 156 U.S. at 458-459. If Ms. Longson wants to hear petitioner testify at the start of the trial, she cannot be presuming petitioner to be innocent because the presumption of innocence must be conclusive until destroyed by sufficient proof. When the trial court sustained the prosecutor's objection, it did not allow defense counsel the constitutionally secured opportunity to prove to that trial court that Juror Longson had a prejudice against petitioner's presumption of innocence. The trial court erred in ignoring how her desire to hear petitioner testify was diluting petitioner's presumption of innocence at that point in time which a court instruction at the end of the trial cannot repair. Tsipouras v. Minnesota, 567 N.W.2d. at 275; (*Supra, 4-6*); (A-17). Moreover, the trial court's belief that Ms. Longson said that she could follow the instruction should the defendant not testify ignores the fact that she brought it up again after being instructed by the Judge during *voir dire*.

Although petitioner contends that Ms. Longson was in fact biased, prejudicial and impartial against petitioner's rights

based on application of this Court's rulings to the *voir dire* transcripts, at the very least petitioner was denied his guaranteed constitutional right to prove to Judge Bush that Ms. Longson had actual prejudice against petitioner's case. Petitioner did object, he did demonstrate prejudice regarding Longson's failure to accept the presumption of innocence, and he has demonstrated that Juror Longson is subject to challenge for cause.

Petitioner contends that he is entitled to relief because his due process rights were violated. Petitioner respectfully requests that certiorari be granted.

## III. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Petitioner was denied effective assistance of trial counsel under the *Strickland* standard because trial counsel did not exercise any challenges against questionable jurors. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). A review of the record demonstrates that counsel's decision to seat these jurors was unreasonable. Actual bias need not be shown in certain egregious situations. Smith v. Phillips, 102 S.Ct. 940, 948 (1982), 455 U.S. 209, 220-221; *See also*, Johnson v. Armontrout, 961 F.2d at 756 (8th Cir. 1992). Some Circuits have adopted implied bias standards in certain situations where the juror is close to someone who has been involved in a similar fact pattern. In Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991), a juror sitting in a murder trial where the defendant's defense was battered wife syndrome was presumed to be biased because the juror herself was involved in an abusive family situation. In United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979), the court presumed that a juror whose sons were currently imprisoned for heroin-related crimes could not remain impartial during a heroin conspiracy trial. In United States v. Allsup, 566 F.2d 68 (9th

Cir. 1977), the court presumed bias of jurors who worked in one of the banks that defendant allegedly robbed. In Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968) the court held that a juror was presumptively biased because he had been the participant in a love triangle similar to the one at issue. In United States ex rel DeVita McCorkle, 248 F.2d 1 (3d Cir.1957), the court imputed bias to a juror in a robbery case because she had been the victim of a robbery. In Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992), jurors who were burglarized during a burglary trial were presumed biased. In State v. Larue, 722 P.2d 1039 (Hawaii 1986), the court held that a juror's statement in deliberations regarding her personal experience with child abuse to buttress reliability of a child's testimony violated defendant's right to a fair trial.

Implied bias standards have also been adopted by this Court regarding situations where the juror has formed an opinion about the case prior to trial from media coverage. Irvin v. Dowd, 81 S.Ct. 1639, 1642-1645 (1961), 366 U.S. 717, 727; Murphy v. Florida, 421 U.S. 794, 799 (1975), 95 S.Ct. 2031, 2036; See also, Reynolds v. United States, 98 U.S. 145, 155 (1879).

In the case at bar, it is unreasonable for defense counsel to allow all of these jurors to sit. Herzog- Lowery testified that she was robbed at gunpoint one week earlier. (Tr. I 51, 18-20). Jaggers testified that her mother's house had recently been broken into and that she herself had money stolen. (Tr. I 60, 15-18). Longson on her own volition, testified that her niece, that she indicated was as close to her as a daughter, had been abducted and that "something bad happened" as well as her inability to understand the defendant's right to remain silent and presumption of innocence. (Tr. I, 245-249). Welch testified that his daughter had been molested. (Tr. I 58, In 13-15). Salek testified that she was shocked over the bizarre nature of the story when she read it in the papers and when asked if she could put it aside she said three times that she

would "attempt to do so" and "I think so." (Tr. I 77, lines 6-10). Salek also testified that she had **strong feelings against the "perpetrator"** which she was not sure how that would **"affect her judgment"**, that she was afraid that she was going to get obsessed with the case because it was negative, and that she dwells on matters such as this and **"can't change gears"**. (Tr. I-284, In 10-22, 281, lines 1-10). **Van testified that her sister was raped.** (Tr. I 96, lines 4-7). Wilcox testified that she had worked with a female student who had been the victim of a sexual assault as well as having worked with the prosecutor's brother. (Tr. I 306 and 308). Salek was so obviously and clearly biased towards petitioner the prosecutor did not even bother voir diring her. (Tr. I 296, line 8). As to the other jurors with previous rapes, abductions, assaults at gun point and sexual assaults on immediate family members, clearly **all** these jurors should not have been sitting for the trial.

Defense counsel was objectively deficient in allowing **all** these jurors to sit. An attorney acting reasonably does not allow a juror to sit who has strong feelings believing the perpetrator bears the responsibility in these factual situations admitting that she was not sure how these opinions would affect her judgment. There is a reasonable probability that the outcome of the trial would have been different had petitioner's counsel removed **some** of these jurors because both codefendants, who admitted to having sex with the girl after petitioner, were both acquitted where it was consistently testified to by Ms. Shadden in both trials that petitioner was the least culpable. (Sentencing Tr., pg.22). The same experts and witnesses testified to virtually the same things at both trials. The difference in both cases was the jury. It is tangibly and concretely demonstrated that the outcome of the trial would have been different if counsel had removed some of these jurors because acquittals actually happened with virtually identical testimony. Accordingly, petitioner was denied effective assistance of trial counsel and respectfully requests that certiorari be granted.

## IV. PETITIONER WAS DENIED HIS SIXTH AMENDMENT GUARANTEE TO AN IMPARTIAL JURY BECAUSE A JUROR HAD A PREFORMED OPINION THAT SHE COULD NOT LAY ASIDE.

Juror impartiality or bias can be imputed on a juror if he has a formed opinion about the case prior to trial. Irvin v. Dowd, 366 U.S. 717, 722 (1961), 81 S.Ct. 1639, 1642-1645; Murphy v. Florida, 421 U.S. 794, 799 (1975), 95 S.Ct. 2031, 2036; *See also*, Reynolds v. United States, 98 U.S. 145, 155 (1879). This does not mean that qualified jurors must be totally ignorant of the facts and issues in the case prior to trial; however, the juror must reasonably show that prior impressions can be laid aside and a verdict rendered solely on the evidence in court. Murphy v. Florida, 421 U.S. at 800, 95 S.Ct. at 2036; *See also*, Reynolds v. United States, 98 U.S. 145, 155 (1879). A juror's unequivocal answer of impartiality is not final in these situations because the formed opinion permeates in the mind and the element of human frailty must be accounted for. Irvin v. Dowd, 366 U.S. at 727-728, 81 S.Ct. at 1645.

In the case at bar, juror Salek shows a preformed opinion partly emanating from pretrial publicity which should have disallowed her from serving on the jury. Salek testified that she was shocked over the bizarre nature of the story when she read it in the paper (Tr. I 281-284 and Tr. I 76-77); that she obsesses with anything negative; she dwells on things that are negative in nature; that she has strong feelings regarding the fact pattern; that she was not sure how this would affect her judgement in this case (Tr. I 284, lines 13-15); that the perpetrator bears the main responsibility here and she "can't change gears". (Tr. I 281-284 and Tr. I 76-77.) When asked if she could put it aside, she said she would "attempt to do so" and "I think so" three times. (Tr. I 77).

Under these circumstances, Salek does not give a reasonably assertive response to the question of impartiality. She admits that her judgement is affected and she responds extremely tentatively three times to the question as to whether she could be impartial. Ms. Salek's responses make her circumstances more skeptical than those in Irvin where at least in Irvin the jurors gave absolute responses to their impartiality. Ms. Salek admitted that her prior impressions could not be laid aside to render a verdict solely on the evidence. The response, "I think so" and "I will attempt to do so" and "I think so" is too tenuous particularly in light of the fact that Salek herself admitted she was not sure how her strong feelings were going to affect her judgment. (Tr. I 77, Tr. I 284). **Salek was so obviously and clearly biased the prosecutor did not even bother voir diring her. (Tr. I 296, line 8).** As Ms. Salek was unfit to serve as a juror due to pretrial publicity that she could not lay aside, petitioner's Sixth Amendment guarantee to an impartial jury was violated. Petitioner respectfully requests that certiorari be granted.

## CONCLUSION

Because the final state judgment and published opinion denying post conviction relief conflict with this Court's federal constitutional decisions, petitioner respectfully requests that certiorari be granted so the issues may be reviewed.

FRANK A. DELLE DONNE, ESQ.
*Counsel of Record*
342 Madison Avenue, Suite 1417
New York, NY 10173
(212) 599-3844

DATED: December 12, 1997

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Petitioner,

ORDER AND MEMORANDUM

vs.

File No. 89042484

Christopher A. Tsipouras,
Respondent.

The above-entitled matter came before the Honorable Philip D. Bush, Judge of District, upon Defendant's Petition for Post Conviction Relief.

On March 5, 1996, Petitioner filed a Petition for Post Conviction Relief. On June 12, 1996, this Court issued an Order requiring Petitioner to file a Memorandum of Law addressing several issues and the State to file a Response to Petitioner's Memorandum. On July 5, 1996, Frank A. Delle Donne, Esq., submitted a Memorandum of Law in Support of Petition for Post Conviction Relief on Behalf of Petitioner Christopher Tsipouras. On July 18, 1996, Lee Barry, Esq., Assistant Hennepin County Attorney, submitted an Answer to Petition for Post-Conviction Relief on behalf of the State.

The Court, upon the files, records, and proceedings herein, makes the following:

**ORDER**

1. Defendant's petition for post-conviction relief is denied, and his petition is dismissed.

2. The attached Memorandum is incorporated into this Order.

BY THE COURT
/s/ Philip D. Bush
Judge of District Court

Dated: 10/31/96

## MEMORANDUM

1. Facts and Procedural History

On December 13, 1989, Petitioner Christopher Tsipouras was convicted of first degree criminal sexual conduct. On January 8, 1990, Petitioner was sentenced to an executed term of 120 months. On January 9, 1991, the Minnesota Court of Appeals affirmed Petitioner's conviction and sentence. On February 20, 1991, the Minnesota Supreme Court denied Petitioners request for review. On March 5, 1996, Petitioner filed a Petition for Post-Conviction Relief. In an Order filed on June 12, 1996, this Court ordered the parties to submit memoranda addressing several issues. Petitioner filed a Memorandum in Support of Petition for Post Conviction Relief on July 5, 1996. The State filed an Answer to Petition for Post-Conviction Relief on July 18, 1996.

In his Petition for Post-Conviction Relief, Petitioner contends that 1) the trial court erred in not granting defense counsel's motion for a mistrial due to a race-based peremptory strike by the prosecution; 2) the trial court erred in preventing defense counsel from probing jury bias; 3) Petitioner was denied effective assistance of trial counsel because his counsel did not exercise peremptory or for cause challenges against biased jurors; and 4) Petitioner was denied effective assistance of appellate counsel because his counsel failed to raise all possible issues on appeal. Petitioner has requested an evidentiary hearing on these issues. Petitioner requested that seven jurors be called at an evidentiary hearing to establish that they were "unfit to serve as a juror." It is unclear from Petitioner's request whether he also seeks to call the victim in this case, Holly Shadden, to establish that she "was not the victim of any sexual assault."

II. Analysis

Petitions for post- conviction relief are governed by Minn. Stat. §590.01-.06 (1994). Section 590.04, subdivision 1 requires the district court to grant a hearing on the issue raised in the petition "[u]nless the petition and the files and records of the record proceeding conclusively show that the petitioner is entitled to no relief , . . ." A petitioner seeking post-conviction relief has the burden of establishing facts that warrant a reopening of the case. State v. Kelly, 535 N.W.2d 345, 347 (Minn.1993). An evidentiary hearing upon a petition for post conviction relief is not required unless the Petitioner alleges such facts which, if proven by a fair preponderance of the evidence, would entitle him or her to the requested relief. Roby v. State, Roby III), 547 N.W.2d 354, 356 (Minn., 1996)(citing Rainer, 502 N.W.2d at 787). The facts alleged must be "more than argumentative assertions without factual support." Id.(quoting Beltowski v. State, 289 Minn. 215, 217, 183 N.W.2d 563, 564 (1971)).

The State argues that Petitioner is barred from raising the issues in his Petition because they were not raised on direct appeal. The district court may summarily deny a petition when the issues raised have previously been decided by the Court of Appeals or the Supreme Court in the same case. Minn.Stat. §(3) (1994). Moreover, the Supreme Court has consistently held that all matters raised in the direct appeal, or all claims known but not raised, will not be considered in a subsequent petition for post-conviction relief. State v. Knaffla, 309 Minn. 246, 252 243 N.W.2d 737, 741 (Minn. 1976). The Batson issue and the issue of the court not allowing further probing of juror bias were known but not raised at the time of the appeal. Nevertheless, the court will address these issues on the merits.

Direct appeal is not the most appropriate way to raise an ineffective assistance of counsel claim because the reviewing

court does not "have the benefit of all facts concerning why the defense did or did not do certain things." Roby v. State, 531 N.W.2d 482, 484 n.1 (Minn. 1995), (quoting State v. Zemechel, 304 N.W.2d 365, 367 (Minn. 1981)). The Supreme Court has previously considered ineffective assistance of counsel claims in post-conviction proceedings where the petitioner did not raise the claim on direct appeal. Scruggs v. State, 484 N.W.2d 21, 25 (Minn. 1992). Thus, even though Petitioner did not raise his ineffective assistance of counsel claim on direct appeal, he is not barred from raising it here.

A. Race based Peremptory Strike by the Prosecution

Petitioner claims that the trial court committed reversible error in not granting defense counsel's motion for a mistrial when the prosecution made a race based peremptory challenge. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors because of their race. Id. at 89. In Batson, the Court established a procedure for courts to use in determining whether a challenge was based on race. First, the defendant must make a prima facie showing of discrimination on the part of the prosecution. Id. at 93-94. The defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the jury panel members of the defendant's race. Id. at 96. In addition, the defendant must show facts that raise an inference that the prosecutor used his challenge to exclude jurors because of their race. Id. After the prima facie showing is made, the burden shifts to the prosecution to provide an explanation for the challenge. Id. at 97.

Petitioner claims that the Powers v. Ohio, 499 U.S. 400 (1991) decision allows him to make a Batson challenge even though he is Caucasian and the challenged juror is African American. In Powers, the United States Supreme Court determined that a defendant could make a Batson challenge

even if the juror is of a different race than the defendant. Id. Prior to the Powers decision, the Court had decided that new rules resulting from cases involving Batson challenges would not be applied retroactively. Teague v. Lane, Director, Illinois Dept. Of Corrections, 489 U.S. 288 (1989). "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. The two exceptions to the general rule are "certain kinds of primary, private individual conduct beyond the power of a law making body to proscribe", and " procedures without which the likelihood of an accurate conviction is seriously diminished." Id. at 310-13. Because the rule announced in Powers does not fit into either exception, it is not applied retroactively. Petitioner's conviction became final on February 20, 1991, when the [Minnesota] Supreme Court denied his request for review. Powers was decided in April 1991. Therefore, Powers does not apply to this case.

At petitioner's trial, the prosecution used a peremptory to dismiss an African American juror. Petitioner's counsel made a Batson challenge. The court found that Petitioner did not make a prima facie showing of discrimination because Petitioner was Caucasian and the juror was African American. Thus, the court did not require the prosecutor to provide any reason for the peremptory challenge. Because Powers had not yet been decided and is not retroactive, the procedures set out in Batson control. Petitioner's Batson challenge failed because petitioner is of a different race than the challenged juror. Petitioner is not entitled to post conviction relief based on any alleged race based peremptory strike.

B. Probing claims that the trial court committed reversible error in preventing his trial counsel from probing juror bias. A defendant must show the actual existence of an opinion that will raise the presumption of impartiality in order to dismiss a

juror for cause. Irvin v. Dowd, 366 U.S. 717, 722, 723 (1961). If the individual has formed a positive opinion about the defendant's guilt, he or she is incompetent to serve as a juror. Id. Therefore, the defendant must be allowed to extensively examine potential jurors in order to obtain a fair and impartial jury. See United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). If, during questioning, a potential juror indicates an ability to follow the court's instructions, and the court believes the juror, the juror may properly serve. State v. Graham, 371 N.W. 204, 206-07 (Minn. 1985).

Petitioner contends that his attorney was not allowed to fully examine juror Longson about Petitioner's right to remain silent. Mr. Grochal asked Ms. Longson the following questions:

Mr. Grochal: Would you expect my client to testify?
Ms. Longson: It would be nice to hear what he has to say.
Mr. Grochal: What if he didn't; makes it tough?
Ms. Longson: It makes it tougher, yes. I would Like to hear both views.

At that point, the court interjected and instructed Ms. Longson that petitioner had an absolute right to remain silent and did not have to testify. At that point, the following exchange took place

The Court: If he chooses not to testify, you will receive a jury instruction that says he doesn't and that you would not draw any negative or bad inference towards him as a result of that. Would you be able to follow this instruction if that fact scenario happens? He may testify and he may not. That's his decision.
Ms. Longson: That's fine, yes.

The Court: You would be able to follow that?
Ms. Longson: Yes.
The Court: I wanted to clarify it since it was not an area of law that I got into when I gave the preliminary instruction but it's come up.
Mr. Grochal: Would it bother you to have to follow the instruction?
Ms. Longson: No problem. He has the right to to remain silent.

At that point, Mr. Grochal questioned Mr. Longson about her opinion about police officers. In responding to a question concerning how much importance she would attach to a police officer's testimony, Ms. Longson said "I would like to hear what the man— the girl and the young man have to say. I don't know what the police man will say to really make it concrete. I mean, they were not there." At that point Mr. Grochal began to question Ms. Longson again about her statements that she would like to hear what the "young man had to say". The prosecutor objected to any further inquiry on this subject because the questions had already been answered. The court sustained the objection.

The court's trial notes indicate that Mr. Grochal's questioning of Ms. Longson lasted 28 minutes. During that time, Mr. Grochal questioned Ms. Longson fully about Petitioner's right to remain silent and Ms. Longson's ability to follow the court's instructions. Ms. Longson indicated that she understood that Petitioner had a right to remain silent and that she could follow the court's instruction not to draw any negative inferences if he decided not to testify. Furthermore, Petitioner has not demonstrated that any prejudice resulted from Ms. Longson's desire to "hear what the young man has to say." Petitioner did testify at the trial and there is no indication that he considered not testifying. His trial strategy was to attempt to prove that the victim had consented to have

sex with him. It is difficult to imagine how he would prove that defense without testifying. Petitioner has not demonstrated that he is entitled to post conviction relief based on insufficient questioning of juror Longson.

C. Ineffective Assistance of Trial Counsel

Petitioner claims that he was denied effective assistance of trial counsel because his attorney did not exercise a peremptory challenge or a challenge for cause to excuse several jurors. The United States Supreme Court has developed, and the Minnesota Supreme Court has adopted, a two-part test for determining whether to grant a new trial based on ineffective assistance of counsel. Gates v. State, 398 N.W. 2d 558, 561 (Minn.1987); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under that test, the burden is on Petitioner to affirmatively prove that 1) counsel's representation fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Gates, 398 N.W.2d at 561 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2068). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068). There is a strong presumption that an attorney's performance falls within the wide range of "reasonable professional assistance." State v. Jones, 392 N.W. 2d 224, 236 (Minn. 1986).

Petitioner claims that voir dire revealed that several jurors were not qualified to sit on the jury because they had been victims of crime or knew someone who had been a victim of a crime. As evidence of this, Petitioner points to portions of the transcript in which juror Lowery indicated that she was robbed at gunpoint one week before the trial; juror Jaggers' mother's house had been broken into and she herself had money taken from her purse; juror Longson's close niece had been abducted and "something bad happened;" juror Welch's

daughter had been molested; juror Van's sister had been raped; and Wilcox had worked with a female student who had been the victim of a sexual assault and had worked with the prosecutor's brother. In addition, Petitioner asserts that his counsel should have struck juror Salek from the jury because she said she had been shocked over the bizarre nature of the story when she read about it in the newspapers and indicated that she had strong feelings about date rape.

Petitioner relies on Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992), in support of his argument that these jurors were biased and his trial counsel should have attempted to remove them from the jury. In Johnson, several jurors on the defendant's panel had already convicted a codefendant. It was clear that some of them had formed opinions about the defendant's guilt before the trial began. Id. at 754. The court determined that the defendant was prejudiced by the presence of those jurors and granted the defendant a new trial. Johnson, 961 F.2d at 756.

The record in the present case does not suggest that any of the jurors had formed an opinion prior to the beginning of the trial. The fact that some of the jurors had been victims of crime or knew others that had been victimized does not make them unfit to serve as jurors. Likewise, merely having "strong feelings" about date rape does not mean that a juror is biased. The court has an independent responsibility to remove biased jurors. It was the court's belief at the time of the trial and it remains the court's belief that none of the jury members were biased such that they were unfit to serve on the jury.

Selecting a jury requires an attorney to make tactical decisions. For example, despite their experiences with crime, Petitioner's counsel may have believed that these jurors would be receptive to Petitioner's defense theory. In addition, given the limited number of jurors that can be dismissed during voir dire and the fact that peremptory challenges were being

exercised after each juror was examined, Petitioner's counsel may have decided to save his peremptory challenges for more potentially prejudicial jurors that might be called later. It was clearly part of trial counsel's strategy to use strikes as he did. Petitioner's request for an evidentiary hearing to reexamine seven jurors will not be granted. Petitioner has cited no case law and the court is not aware of any case law that allows the reopening of voir dire through a post conviction relief petition.

After observing counsel in this case throughout the trial, it is this Court's belief that he performed his job in an effective, skilled, competent, and professional manner. His performance and skill in the courtroom were well above the average that the court sees. With the benefit of hindsight and knowing the verdict, it is possible to find grounds to criticize the attorney defending the case. However, the courts do not judge ineffective assistance of counsel claims based on the outcome.

Petitioner apparently seeks to call the victim, Holly Shadden, to establish that she "was not the victim of any sexual assault." The jury and appellate courts have already decided that issue. Petitioner has offered no argument as to how cross-examining Holly Shadden again with a different lawyer would establish ineffective assistance of trial counsel. This Court fails to see what would be gained from such a hearing other than harassing the victim years after the trauma occurred. The request for a hearing to recall the victim will be denied. Petitioner has failed to demonstrate that he received ineffective assistance of counsel.

D. Ineffective Assistance of Appellate Counsel

Petitioner argues that he was denied effective assistance of counsel because his appellate counsel failed to raise the Batson issue and an ineffective assistance of trial counsel claim. The analysis outlined above for ineffective assistance of trial counsel claims also applies to claims of ineffective

assistance of appellate counsel. When an appellant and his or her counsel disagree as to what issues should be raised on appeal, counsel is not obligated to raise claims which would detract from other more meritorious claims. Case v. State, 364 N.W.2d 797, 800 (Minn. 1985). "The right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal that the trial record supports." Garasha v. State, 393 N.W.2d 20, 22 (Minn.App. 1986) (citing Gray v. Greer, 778 F.2d 350, 353 (7th Cir. 1985). The Constitution requires only that appellate counsel's choice of issues to raise on appeal does not fall below an objective standard of reasonableness. Id.

Petitioner claims that his appellate counsel's failure to argue all conceivable claims demonstrates that the attorney's performance fell below an objective standard of reasonableness. However, as discussed above, the case law indicates that an attorney is not required to raise every possible claim on appeal. See Case, 364 N.W.2d at 800. An appellate attorney may decide not to include lesser claims that would detract from more meritorious claims. Such a decision does not indicate ineffective assistance of counsel. Petitioner admits in his Memorandum that the appellate counsel considered the Batson claim but decided that it was not meritorious. Such a strategic decision is not ineffective assistance of counsel. Petitioner has failed to support his claim that his appellate counsel's representation at the time of his direct appeal was unreasonable.

III. Conclusion

The Petition, file and record conclusively show that Petitioner is not entitled to relief. Therefore, there is no need for a hearing in this matter and Petitioner's Petition for Post-Conviction Relief is summarily dismissed pursuant to Minn. Stat. § 590.04(3).

P.D.B.
Initialed 10/31/96

567 N.W.2d 271
**(Cite as: 567 N.W.2d 271)**

**Christopher A. TSIPOURAS, petitioner, Appellant,**

**v.**

**STATE of Minnesota, Respondent.**

**No. C2-96-2606.**

Court of Appeals of Minnesota.

July 29, 1997.

Defendant brought postconviction petition challenging his conviction for criminal sexual conduct, which had been affirmed on direct appeal. The District Court, Hennepin County, Philip D. Bush, J., summarily denied petition, and defendant appealed. The Court of Appeals, Davies, J., held that: (1) Powers decision extending prohibition against purposeful discrimination in jury selection to cases where defendant's race differs from that of excluded juror established new constitutional rule of criminal procedure, and thus could not be applied retroactively; (2) defendant failed to establish actual bias on part of juror; and (3) defendant did not receive ineffective assistance from trial or appellate counsel.

Affirmed.

***273** Syllabus by the Court

A defendant whose conviction was final before the Supreme Court decided Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), is not entitled to the retroactive application of Powers on collateral review of his conviction because Powers announced a new constitutional rule of criminal procedure.

Hubert H. Humphrey, III, Attorney General, St. Paul, for Respondent.

Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, Minneapolis, for Respondent.

Frank A. Delle Donne, New York City, for Appellant.

Considered and decided by HARTEN, P.J., PARKER and DAVIES, JJ.

OPINION

DAVIES, Judge.

By postconviction petition, appellant sought reversal of his conviction for criminal sexual conduct, alleging that he was denied his constitutional right to a fair trial and effective assistance of trial and appellate counsel. We affirm the district court's summary denial of appellant's petition.

FACTS

A jury convicted appellant Christopher Tsipouras of first-degree criminal sexual conduct under Minn.Stat. § 609.342, subd. 1(e)(i) (1988), and of third-degree criminal sexual conduct under Minn.Stat. § 609.344, subd. 1(c) (1988). In 1990, Tsipouras appealed his conviction, arguing that the trial court erred regarding various evidentiary and sentencing matters and in refusing to order a new trial based on prosecutorial misconduct. We affirmed Tsipouras's conviction. State v. Tsipouras, No. C7-90-708, unpub. op., 1991 WL 1942 (Minn.App. Jan. 15, 1991), review denied (Minn. Feb. 20, 1991).

*274 Tsipouras petitioned for postconviction relief in early 1996, seeking to vacate his judgment of conviction. Tsipouras

claimed that his due process rights were violated because the prosecution exercised a race-based peremptory challenge, defense counsel's voir dire was inappropriately curtailed, and he was denied effective assistance of trial and appellate counsel. The district court summarily denied Tsipouras's petition and this appeal followed.

## ISSUES

I. Did the State exercise an unconstitutional, race-based peremptory challenge?

II. Did the trial court impermissibly curtail defense counsel's voir dire?

III. Was Tsipouras denied effective assistance of trial and appellate counsel?

## ANALYSIS

[1][2][3] Our review of a postconviction proceeding is limited to determining whether the evidence is sufficient to sustain the findings of the postconviction court. Scruggs v. State, 484 N.W.2d 21, 25 (Minn.1992). A "postconviction proceeding is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside." State ex rel. Gray v. Tahash, 279 Minn. 248, 250, 156 N.W.2d 228, 229 (1968). Absent an abuse of discretion, a trial court's postconviction decision will not be disturbed on appeal. McMaster v. State, 551 N.W.2d 218, 218 (Minn.1996).

[4] Summary dismissal of a postconviction petition is permitted unless facts are alleged that, if proved, would entitle a petitioner to the requested relief. State ex rel. Roy v. Tahash, 277 Minn. 238, 245, 152 N.W.2d 301, 306 (1967). Our review of the district court's decision requires us to determine whether any of the alleged grounds for relief

necessitates a hearing.

I. Race-Based Peremptory Challenge

[5][6] Tsipouras, who is white, claims he was denied a fair trial because the prosecutor used a peremptory challenge to strike a black venireperson. The Equal Protection Clause of the U.S. Constitution prohibits purposeful discrimination in jury selection. Batson v. Kentucky, 476 U.S. 79, 84-89, 106 S.Ct. 1712, 1716-19, 90 L.Ed.2d 69 (1986). To establish a prima facie case of purposeful discrimination, a defendant must show: (1) that the defendant is a member of a cognizable racial group and that the prosecution used peremptory challenges to remove members of that racial group from the jury, and (2) that this and other relevant circumstances raise an inference that the prosecution is discriminating on the basis of race. Id. at 96, 106 S.Ct. at 1723.

[7] The trial court denied the defense motion for a mistrial based on Batson, ruling that Batson was not applicable because Tsipouras and the stricken juror were not the same race. Tsipouras argues that the postconviction court erred by failing to consider the effect on Batson of Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In Powers, the Supreme Court extended the Batson protection against purposeful racial discrimination to cases where the defendant's race differs from that of the excluded juror. Id. at 415-16, 111 S.Ct. at 1373-74.

[8][9] Tsipouras may on collateral review benefit from Powers only if Powers was "dictated by precedent existing at the time" his conviction became final and was not a "new constitutional rule of criminal procedure." Teague v. Lane, 489 U.S. 288, 301, 310, 109 S.Ct. 1060, 1070, 1075, 103 L.Ed.2d 334 (1989) (emphasis omitted). [FN1] Because Tsipouras's conviction became final before Powers was decided, the postconviction court refused to apply Powers, assuming that

the retroactivity rules of Teague applied.

> FN1. Teague suggests two exceptions to the proscription against retroactive application of new rules on collateral review. "[A] new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " or is a "watershed rule of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Teague, 489 U.S. at 311-13, 109 S.Ct. at 1075-77. Tsipouras does not contend that these exceptions apply in his case.

*275 [10] Tsipouras characterizes Powers as an "explanation" of Batson rather than a new rule and on that basis claims he is entitled to a retroactive application of Powers. Although Minnesota courts have not considered this issue, other courts characterizing the relationship between Powers and Batson have concluded that Powers announced a new rule. See Jones v. Gomez, 66 F.3d 199, 203 (9th Cir.1995) (noting that, although not a radical break from precedent, Powers announced new rule), cert. denied, — U.S. —, 116 S.Ct. 1437, 134 L.Ed.2d 559 (1996); Farrell v. Davis, 3 F.3d 370, 372 (11th Cir.1993) (describing Supreme Court holding in Powers as "complete departure from the established precedent" and thus new rule); Echlin v. LeCureux, 995 F.2d 1344, 1351 (6th Cir.1993) (stating that holding in Powers is not dictated by Batson and that Powers announced new rule), cert. denied, 510 U.S. 993, 114 S.Ct. 552, 126 L.Ed.2d 453 (1993); Holland v. McGinnis, 963 F.2d 1044, 1055 (7th Cir.1992) (finding that Batson did not dictate result in Powers), cert. denied, 506 U.S. 1082, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993); see also Hopson v. Fredericksen, 961 F.2d 1374, 1377 n. 3 (8th Cir.1992) ("We note that elements one and two

of the Batson prima facie analysis have been recently negated by the Supreme Court in Powers * * *.").

We reject Tsipouras's characterization of Powers and decide, consonant with prevailing judicial opinion, that Powers announced a new constitutional rule of criminal procedure. Consequently, we agree with the postconviction court that Tsipouras cannot benefit from the application of Powers on collateral review of his conviction.

II. Voir Dire

Tsipouras believes he was denied his due process right to an impartial jury when the trial court limited defense voir dire of a prospective juror who, during voir dire, said she wanted to hear Tsipouras testify. Tsipouras believes that the trial court's actions led the defense to accept a biased juror.

[11] The trial court instructed the juror on Tsipouras's Fifth Amendment privilege not to testify and asked if she would be able to follow the instruction. She said that she would. As voir dire continued, the prospective juror again observed that she would like to hear what both Tsipouras and the victim had to say. The trial court sustained the State's objection to continued questioning on the matter and defense counsel accepted the juror.

> In an appeal based on juror bias, an appellant must show that the challenged juror was subject to challenge for cause, that actual prejudice resulted from the failure to dismiss, and that appropriate objection was made by appellant.

State v. Stufflebean, 329 N.W.2d 314, 317 (Minn.1983).

[12] Defense counsel did not challenge the juror for cause after voir dire. Tsipouras's claim that he need not have done so because the juror was "actually prejudiced" is conclusory, and Tsipouras has offered no evidence to support this claim. We decline, under these circumstances, to presume juror bias.

III. Ineffective Assistance of Trial and Appellate Counsel

Tsipouras alleges that his defense counsel was ineffective because counsel failed to challenge for cause or exercise peremptory challenges to remove several jurors who Tsipouras now claims were biased.

To set aside a conviction on the ground of ineffective assistance of counsel, a defendant must show "that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Gates v. State, 398 N.W.2d 558, 561 (Minn.1987) (quoting Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984)). The court must be "highly deferential" when scrutinizing defense counsel's performance. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

[13][14] Defense counsel's decision to accept jurors who had recent experiences with *276 violent crime or who had expressed a point of view on date rape is within the "wide range of reasonable professional assistance" permitted under Strickland. Attorneys must make tactical decisions during jury selection, and a claim of ineffective assistance of counsel cannot be established by merely complaining about " 'counsel's failure to challenge certain jurors or his failure to make proper objections.' " State v. Prettyman, 293 Minn. 493, 494, 198 N.W.2d 156, 156 (1972) (quoting State v. Russell, 272 Minn. 463, 465, 138 N.W.2d 690, 692 (1965)).

[15][16] Further, Tsipouras has failed to show how he was prejudiced by the alleged deficiencies in his attorney's performance. See Gates, 398 N.W.2d at 562 (stating that a

defendant must show that "but for the errors the result of the proceeding probably would have been different"). Tsipouras believes that his co-defendants' acquittals and the lack of evidence supporting his conviction indicate that "but for" his counsel's performance he too would have been acquitted. We disagree. This court has already decided that there was sufficient evidence to support Tsipouras's conviction. Tsipouras, unpub. op. at 3. The acquittal of Tsipouras's co-defendants is not dispositive of the issue of ineffective assistance of counsel. See Morgan v. State, 384 N.W.2d 458, 460-61 (Minn.1986) (acquittal of co-defendants not persuasive evidence of ineffective assistance of counsel).

Tsipouras believes that he received ineffective assistance of appellate counsel because his attorney failed, on direct appeal, to raise the issues he now raises.

[17] To render effective assistance of counsel, an attorney is not required to advance "every conceivable argument on appeal that the trial record supports." Garasha v. State, 393 N.W.2d 20, 22 (Minn.App.1986). Rather, the attorney's choice of issues must not fall beneath the Strickland standard of objective reasonableness. Id.

[18] Although Tsipouras considers the issues raised in his postconviction petition "fundamentally essential," we have concluded that these claims, like the seven claims raised on direct appeal, do not support a reversal of his conviction. Counsel's decision not to raise these issues on direct appeal was an exercise of judgment well within the Strickland standard.

DECISION

The postconviction court's summary dismissal of Tsipouras's petition for postconviction relief was proper.

Affirmed.

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STATE OF MINNESOTA
IN SUPREME COURT
C2-96-2606

OFFICE OF
APPELLATE COURTS
SEP 18 1997
FILED

Christopher A. Tsipouras, petitioner,

Appellant,

vs.

State of Minnesota, Respondent.

**ORDER**

Based upon all files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Christopher A. Tsipouras for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the request to admit Frank A. Delle Donne pro hac vice in the above-entitled matter be, and the same is, granted.

Dated: September 18, 1997

BY THE COURT:

/s/
Chief Justice

**MINN.STAT. 590.01**

590.01. Availability, conditions

**Subdivision 1. Petition.** Except at a time when direct appellate relief is available, a person convicted of a crime, who claims that the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state, may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate. Nothing contained herein shall prevent the supreme court or the court of appeals, upon application by a party, from granting a stay of a case on appeal for the purpose of allowing an appellant to apply to the district court for an evidentiary hearing under the provisions of this chapter. The proceeding shall conform with sections 590.01 to 590.06.

Subd. 2. This remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.

Subd. 3. A person who has been convicted and sentenced for a crime committed before May 1, 1980 may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively, including resentencing under subsequently enacted law.

No petition seeking resentencing shall be granted unless the court makes specific findings of fact that release of the

petitioner prior to the time the petitioner would be released under the sentence currently being served does not present a danger to the public and is not incompatible with the welfare of society.